Appeal No: 49669-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

ROBERT E. TUTTLE, JR.,

Appellants,

v.

ESTATE OF ANITA D. TUTTLE, Patricia Hicklin, Personal Representative, TUTTLE FAMILY LIMITED PARTNERHSIP, Eric Anderson, General Partner; PATRICIA HICKLIN and SYDNEY HICKLIN, SR., h/w, ROBERT E. TUTTLE SR. TESTATAMENTARY TRUST uad 11/171993, Patricia Hicklin, Co-Trustee,

Respondents.

REPLY BRIEF OF APPELLANT TUTTLE FAMILY LIMITED PARTNERSHIP

APPEAL FROM THE CLLAM COUNTY SUPERIOR COURT
The Honorable Christopher Melly
Cause No. 13-2-01120-7

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INTRODUCTION

The trial court's decision that Robert Tuttle, Jr.'s ("Robert, Jr.") claims to ownership of real property of the Tuttle Family Limited Partnership ("FLP") in the present case are barred because of a decision in a similar case brought by the FLP is just plain wrong. The FLP's case did not include any factual claims or causes of action which addressed the property ownership issue. The present case directly raises factual issues concerning Robert Jr.'s claim of ownership to a portion of the FLP property. The legal theories of recovery (adverse possession, constructive or resulting trust, unjust enrichment, et.al.) asserted by Robert, Jr. against the FLP in the present case (Complaint, CP 298, incorporating specific allegations of Creditor's Claim, CP 304) are totally different than the legal theories raised by the FLP against its previous general partners (accounting, conversion, breach of fiduciary duty) alleged by the FLP in its complaint (CP 319-320). Robert, Jr. also included similar claims for mismanagement against the former general partners (CP 298-299) but those similar claims in both actions arose from the management of the FLP property, not from its ownership.

Robert, Jr. was neither a plaintiff nor a defendant in the FLP's action. The trial court decided, however, that because he was a limited partner in the general partnership, he was before the court in the FLP

action, so that *res judicata* could apply to his property claims, as claims that should have been litigated in the FLP action. Assuming that Robert, Jr. was before the court in the FLP action in his capacity as a limited partner, his interests and that of the FLP were identical; both seeking redress to the FLP and its partners for the actions of a previous general partner. In this position, Robert, Jr. and the FLP were not in a position to assert claims against each other. They were not adversary parties who could be required to litigate the claims between them because of this status.

The trial court nonetheless ignored these salient and insurmountable problems to finding that *res judicata* applied to Robert, Jr's claim against the FLP, and barred Robert, Jr.'s property claims against the FLP because of the earlier decision dismissing the FLP's claims of mismanagement. The trial court illogically decided that Robert, Jr. should have intervened in the FLP case, to raise issues between non-adversary parties, which had nothing to do with the mismanagement of the FLP property, and which claims were already pending in this action.

The trial court's ruling appears to be based upon a determination that the legal doctrine of *res judicata* bars all potential claims where there are two parties to litigation who may have claims between themselves. If

they are named parties in the same litigation, however styled as parties, or if they are present due to privity on some issues but not others, the trial court would have them affirmatively required to litigate all existing claims between them in the pending litigation, and that litigation only. The case law does not support or warrant such an expansion of *res judicata* to claims that non-adversary parties may have between themselves, which are effectively unrelated to a pending action.

While the FLP may well be the beneficiary of the trial court's ruling, as it decides Robert, Jr.'s title claim to a portion of the FLP property on the basis of res judicata, the FLP nonetheless objects to the trial court's ruling. The FLP believes that Robert, Jr.'s claim may well have both legal and equitable merits, and believes that a determination of those merits should be decided between Robert, Jr., and the FLP.

1. Applicable Facts and Procedure.

The FLP is the owner of real property involved in two trial court actions, the first of which ended with the decisions from which the present appeal arises, Robert E. Tuttle, Jr. v. The Estate of Anita Tuttle, Tuttle Family Limited Partnership, Patricia and Sydney Hicklin, and the Robert Tuttle, Sr. Testamentary Trust, Clallam County Cause No. 14-2-00463-2 (hereafter the "Robert, Jr. action"). The second was filed by the FLP

subsequent to the Robert, Jr. action, and was entitled Tuttle Family Limited Partnership v. Estate of Anita Tuttle, Robert S. Tuttle Testamentary Trust and Patricia and Sydney Hicklin, Clallam County Cause No. 14-2-00463-2 (hereafter, "FLP action").

There are two differences between these actions, which are of significance for the purposes of application of res judicata. Most obviously, Robert, Jr. is not a party to the FLP action, either as plaintiff or defendant. He is the plaintiff in the Robert, Jr. action, and the FLP is a defendant in that action. Most importantly, however, the factual issues alleged and the causes of action asserted in the two cases are not perfectly congruent.

Alleged in the FLP action are the following causes of actions, against the noted defendants:

a. An accounting is due for the actions of Anita and/or Patricia as General Partner;

b. Anita and/or Patricia had converted assets of the FLP; and

c. Anita and/or Patricia had violated their fiduciary duties to the FLP.

Alleged in the Robert, Jr. action are the following causes of action, against the noted defendants:

a. For a quieting of title in Robert Jr. to real property owned by the FLP;

b. For an accounting of the activities of the FLP; and

c. For damages for the management and operation of the FLP.

The complaint also alleged set of facts relating to Robert, Jr.'s claim to title of property of the FLP (CP 298, 301-303), which facts were not alleged, in any fashion, in the FLP complaint (CP 315).

ARGUMENT OF COUNSEL

The elements which must be present for *res judicata* to bar a subsequent litigation are well settled, and are stated, for example, in Schoeman v. New York Life, Co., 106 Wn.2d 855, 858-859, 726 P.2d 1 (1986):

> The doctrine of res judicata requires a concurrence of identity in four respects: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. Norco Constr., Inc. v. King Cy., 106 Wash.2d 290, 721 P.2d 511 (1986); 859 Bordeaux v. Ingersoll Rand Co., 71 Wash.2d 392, 396, 429 P.2d 207 (1967); Meder v. CCME Corp., 7 Wash.App. 801, 805, 502 P.2d 1252 (1972). In Meder we find at 804-05:
>
> Courts in their concern to eliminate duplicitous litigation and yet allow a party to litigate on a matter which would not have been properly included in the previous action often refer to this doctrine of repose as res judicata, meaning a thing decided, or as a prohibition against splitting causes of action.

> Thus, in Sanwick v. Puget Sound Title Ins. Co., 70 Wn.2d 438, 441, 423 P.2d 624, 38 A.L.R.3d 315 (1967), we find:
>
> This court from early years has dismissed a subsequent action on the basis that the relief sought could have and should have been determined in a prior action. The theory on which dismissal is granted is variously referred to as res judicata or splitting causes of action. Currier v. Perry, 181 Wash. 565, 44 P.2d 184 (1935); Sayward v. Thayer, 9 Wash. 22, 36 Pac. 966, 38 Pac. 137 (1894).

Appellant FLP respectfully suggests that two of the necessary elements for the application of *res judicata* are not present between the Robert, Jr. action and the FLP action, as applied to the factual issues and causes of action relevant to Robert Jr.'s claim of title to FLP property.

1. As concerning the title claims, the "subject matter" of the two actions is different.

In Mellor v. Chamberlin, 100 Wn. 2d 643, 637 P. 2d 610 (1983), the plaintiffs first sued the defendants for misrepresenting the nature of property they had purchased. That suit was settled between the parties. Three years later the plaintiffs sued the seller again, alleging breach of a warranty of title, because they had to settle an adverse possession suit with a neighbor. Defendants' argument that the second suit was bared by *res judicata* was rejected. The Supreme Court stated, 100 Wn.2d at 612:

> Although both lawsuits arose out of the same transaction (sale of property), their subject matter differed. The first

> lawsuit disputed whether the Chamberlins misrepresented the parking lot as part of the sale. The second questioned whether Buckman's claim of encroachment breached the covenant of title. Moreover, the two causes of action were distinct.
>
> Many tests for determining whether the same claim for relief [cause of action] is involved in both cases have been suggested. It has been said that the claim is the same if the same primary right is violated by the same wrong in both actions, or if the evidence needed to support the second action would have sustained the first action[.] (Footnotes omitted.) 2 L. Orland, Wash.Prac., *Trial Practice* § 360, at 400–01 (3d.Ed. 1972). *See also* Curtiss v. Crooks, 190 Wash. 43, 66 P.2d 1140 (1937). Here, the "primary right" not to misrepresent a sale is distinguishable from the right to enforce a breach of a covenant of title. Moreover, evidence to show who owned the parking lot was not directly pertinent in deciding whether the building encroached a few inches.

A similar situation was presented in Nancy's Product, Inc. v. Fred Meyer, 61 Wn.App 645, 811 P.2d 250 (1991). In a first suit, Nancy's was sued by an assignee of Fred Meyer upon its delinquent account with Fred Meyer. A default judgment was eventually entered in favor of the assignee. One year later, Nancy's sued Fred Meyer, alleging that it had suffered damages from Fred Meyer's improper handling of its product. Fred Meyer asserted *res judicata* as a defense to the second action. Finding that both actions arose out of the same transaction, the court nonetheless refused to bar Nancy's claim against Fred Meyer, stating, 61 Wn.App 645,652, 811 P.2d 250 (1991):

> ...evidence to prove the unpaid account was not directly pertinent in deciding whether the salads were negligently prepared and stored, since no affirmative defense against Bergin was asserted by Nancys. Many tests for determining whether the same claim for relief [cause of action] is involved in both cases have been suggested. It has been said that the claim is the same if the same primary right is violated by the same wrong in both actions, or if the evidence needed to support the second action would have sustained the first action.

The holdings of Mellor and Nancy's Product apply to the instant case. The evidence necessary to prosecute the first case, related to management of the FLP, has absolutely nothing to do with the evidence which Robert, Jr. would have to produce to prove his property title claims against the FLP. Facts surrounding the two actions arise out of ownership of real property by the FLP, but otherwise have nothing to do with each other. The Estate argues that both cases arose out of the same transaction. [Estate's brief at 17.] That is patently not correct. Robert, Jr.'s title claims assert property rights arising years before the FLP's complaint against the Estate and Hicklin for mismanagement. All of the facts of those title claims are irrelevant to the mismanagement issues. The trial court should be reversed on this basis.

2. As concerning the title claims, <u>"the persons and parties" are different.</u>

Assuming that Robert, Jr. and the FLP were both parties in the FLP action because the FLP represented Robert, Jr.'s interests, then they would have been co-plaintiffs. *Res judicata* does not apply to bar claims between non-adversary co-parties. In Krivaka v. Webber, 43 Wn.App 217, 221, 716 P.2d 916 (1986), multiple actions arose out of a vehicle accident. Krivaka, Webber, and Webber's employer were sued by passengers in Krivaka's vehicle. Krivaka was also sued by Webber, and the cases were settled. Krivaka then sued Webber's employer, who had been a co-defendant in the prior cases. The employer unsuccessfully asserted *res judicata* as a defense. The court of appeals, in its rejection of the application of the doctrine, stated, 43 Wn.App. at 221:

> If co-parties assert cross-claims and are therefore adversaries, the principles of *res judicata* apply. Pacific Nat'l Bank of Seattle v. Bremerton Bridge Co., 2 Wash.2d 52, 59, 97 P.2d 162 (1939); Snyder v. Marken, 116 Wash. 270, 272–73, 199 P. 302 (1921); 2 L. Orland, Wash.Prac., *Trial Practice* § 373 at 417 (3d,Ed. 1972); Restatement (Second) of Judgments § 38 (1982). Although *res judicata* may apply when co-parties are adversaries through cross pleadings, it applies only to those claims that were actually asserted through cross pleadings. Otherwise, application of *res judicata* in such circumstances would conflict with the rule that cross-claims are permissive.

Krivaka directly answers the conundrum that the trial court's ruling raised: are co-parties, whose interest in the first litigation was identical, nonetheless required to litigate otherwise existing and

adversarial claims between them in the first lawsuit? The answer is no, and should have been no in this case. The trial court should, again, be reversed on its ruling that Robert, Jr.'s title claims against the FLP were barred by the decision in the FLP case on mismanagement issues.

DATED April 3, 2017

Respectfully submitted,

CRAIG L. MILLER & ASSOCIATES, P.S.

By _____

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CERTIFICATE OF SERVICE

I, Sharon Prosser, certify that on April 3, 2017, I caused a true and correct copy of Tuttle Family Limited Partnership's Reply Brief to be served on the following via email as indicated below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 3, 2017, at Port Angeles, Washington.

Sharon Prosser